FILED
MAR 16 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1502

IN THE

Supreme Court of The United States

OCTOBER TERM, 1983

SELDON B. GRAHAM, JR.,

Petitioner,

v.

THREE OR MORE MEMBERS OF THE SIX MEMBER ARMY RESERVE GENERAL OFFICER SELECTION BOARD AND THE UNITED STATES OF AMERICA REPRESENTED BY THE SECRETARY OF THE ARMY,

Respondents.

SUPPLEMENTAL APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SELDON B. GRAHAM, JR.
14303 Broadgreen
Houston, Texas 77079
(713) 497-3700
Petitioner

March 12, 1984

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CLERK

SUPPLEMENTAL APPENDICES
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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 83-2223

SUMMARY CALENDAR

D. C. DOCKET No. CA-H-82-0063

SELDON B. GRAHAM, JR.,

Plaintiff-Appellant,

VERSUS

THREE OR MORE MEMBERS OF THE SIX MEMBER ARMY RESERVE GENERAL OFFICER SELECTION BOARD OF 30 NOVEMBER 1979, et al.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

Before REAVLEY, RANDALL and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 34;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

December 16, 1983

Issued as Mandate: January 23, 1984

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 83-2223
SUMMARY CALENDAR

SELDON B. GRAHAM, JR.,

Plaintiff-Appellant,

VERSUS

THREE OR MORE MEMBERS OF THE SIX MEMBER ARMY RESERVE GENERAL OFFICER SELECTION BOARD OF 30 NOVEMBER 1979, et al.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING

(JAN 11 1984)

Before REAVLEY, RANDALL and WILLIAMS, Circuit Judges.

PER CURIAM:

IT IS ORDERED THAT the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

THOMAS M. REAVLEY
United States Circuit Judge

S-3

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

SELDON B. GRAHAM, JR., *Plaintiff,* v. THREE OR MORE MEMBERS OF THE SIX MEMBER ARMY RESERVE GENERAL OFFICER SELECTION BOARD OF 30 NOVEMBER 1979, THE SECRETARY OF THE ARMY, AND THE UNITED STATES OF AMERICA REPRESENTED BY THE SECRETARY OF THE ARMY, *Defendants.*	CIVIL ACTION No. H-82-0063

Seldon B. Graham, Jr., Pro Se, Houston, Texas.

Jose Berlanga, Houston, Texas Attorney for Defendants.

February 8, 1983

MEMORANDUM AND ORDER

Pending before the Court are Plaintiff's and Defendants' counter-motions for summary judgment. This is a suit by a retired Colonel of the Army Reserve wherein he alleges that he was improperly denied promotion to the rank of brigadier general.

In November, 1979, Plaintiff was considered for promotion by the Reserve General Officer Board of the Army (Board), but was not selected. One month later he was transferred to the Retired Reserve since the Secretary of the Army acting on the Board's recommendation "had

refused [Plaintiff's] appointment to the next higher grade." *See* 10 U.S.C. § 3851(b). Following this Court's Order of January 12, 1981, in Civil Action No. H-80-1321, Plaintiff exhausted his administrative remedies by applying for relief without success to the Army Board for Correction of Military Records.

After the Correction Board's decision, Plaintiff has essentially refiled his earlier suit. He claims that the Army's actions in this matter have been arbitrary and capricious, and have deprived him of property and liberty without due process of law in violation of the Fifth Amendment of the United States Constitution.

At the outset it is worthwhile to note that although Plaintiff is represented pro se, public records indicate that he is a member of the State Bar of Texas (Texas Bar No. 08284000). Accordingly, his pleadings and arguments are entitled to only the same treatment and deference given to the work of all lawyers who are admitted to the bar.

As a second preliminary matter the Court finds that Plaintiff's requests for admission filed on November 24, 1980, in Civil Action No. H-80-1321 are not deemed admitted by operation of Rule 36, Fed.R.Civ.P. Defendants timely filed on November 26, 1980, a motion to stay the application of Rule 36. It would be extremely inequitable and disruptive of judicial proceedings to permit the Rule to operate during the pendency of a motion to stay that very operation. The Court holds that the requests could not be deemed admitted before the motion to stay was decided by the Court's Order of January 12, 1981. After that date the case was dismissed and the Rule could not apply in a cause which was no longer before the District Court. If Plaintiff disagreed with the disposition of the motion and case at that time he should have promptly appealed.

As a second ground of decision the Court holds that all of Plaintiff's various claims, discussed *infra*, including but not limited to the alleged failure to find specific promotional deficiencies of the Plaintiff does not involve "conduct ... [by the Defendants which] violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, ... U.S. ...., ..., 50 U.S.L.W. 4815, 4820 (1982). Therefore, the Court finds the individual Defendants are immune from personal liability and should not be "subject ... to the costs of trial or to the burdens of broad-reaching discovery." *Id.* Dismissal before discovery was therefore appropriate.

Returning to the merits of the fifth amendment claim, the Court notes that Plaintiff must initially establish that he has a property interest in that which was allegedly deprived by the government. The record indicates, and Plaintiff does not contest in this action that by the fall of 1979, he had completed 30 years and 30 days total commissioned service in the Army and five years service in the grade of colonel. Accordingly, under 10 U.S.C. § 3851(a), Plaintiff had "absolutely no possible claim of entitlement to [continued] re-employment," *Board of Regents* v. *Roth*, 408 U.S. 564, 578, (1972), after December, 1979, unless he was promoted to a higher grade. It is uncontroverted that the existing "rules or understandings" in the Army are that field-grade officers can be promoted only through selection by a promotion board. Plaintiff was not selected by such a board, and that fact adversely determines his property interest claim. *See Woodward* v. *Marsh*, 658 F.2d 989, 998 (5th Cir. 1981), *cert. denied*, ... U.S. ...., (1982), (holding that an Army Reserve commissioned officer "has no reasonable expectation of continued employment and thus no property interest protected by the due process clause." Citing *Sims* v. *Fox*, 505 F.2d 857 (5th Cir. 1974) (en banc), *cert. denied*, 421 U.S. 1011 (1975)).

Plaintiff seeks to prevent the application of this conclusion of law by claiming that the Defendants did not follow applicable Army Regulations, thus depriving him of either a property interest or a promotion decision free of arbitrary and capricious reasoning. Plaintiff's first claim is that no notice of his receiving a waiver of required command experience for assignment to a brigadier general's position was included in his personnel file before the file was reviewed by the Board which considered him for promotion. Two years experience in the command of troops at batallion or higher level is a requirement for promotion to brigadier general *or* for assignment to a brigadier's position. Army Regulation (AR) 135-156 ¶ 3-1c, 3-4e (1974). This requirement can be waived by the Secretary of the Army. *Id.* In August, 1979, Plaintiff was assigned to a brigadier general position. His lack of command experience was duly waived by the Secretary's designated representative before the date of assignment. It is agreed by the parties that no record of this waiver was placed in the file that went before the Board.

Although Plaintiff claims that this omission violated the terms of "Paragraph 3-1c and Paragraph 3-4e of AR 135-156," he does not point to any language in the Regulation which supports his summary conclusion. As a matter of fact there is no such language. Neither AR 135-156 nor any other regulation or statute identified by the Plaintiff requires the Army to include such waivers in promotion files. Upon further examination it is clear that Plaintiff's claim is derived from the supposition in his complaint that "[i]t may be reasonable to conclude that the Board may have not recommended Plaintiff for promotion based on this lack of evidence in the file." Original Complaint at 6. In other words, because Plaintiff unilaterally finds his proposed procedure more logical or desirable than the

Army's procedure he claims the government has violated the Regulation. He cannot point to regulatory language or other rules to support his interest, and he does not even claim that he understood that the Army would place a notice of the waiver in his file. (He cannot make the latter claim because he reviewed his file before it was submitted to to the Board and made no objection to the absence of the waiver). In short, Plaintiff's claimed property interest in the waiver is "an abstract . . . desire . . . [amounting to] a unilateral expectation . . . [not based on] existing rules or understandings that stem from an independent source . . . ." *Board of Regents* v. *Roth, supra,* at 577.

The Court also finds that the failure by the Army to include notice of the waiver in the promotion file was not an arbitrary or capricious act. It seems clear from reading Chapter 3, AR 135-156 that only the names of officers recommended for promotion are submitted to the Board for selection consideration. Any doubt in this respect is removed by Paragraph 3 of the Secretary's Instructions to the Board, dated 12 October 1979. (Exhibit 7 to Defendant's motion for summary judgment (MSJ) at 29). That Paragraph clearly informs the Board that they "will consider . . . officers assigned to general officer positions . . who have been recommended for promotion . . . ." Accordingly, there could have been no doubt in the minds of members of the Board that Plaintiff's command experience requirement had been previously waived by the Secretary. *See* AR 135-156 ¶ 3-1c, 3-3a(2), 3-4e (only officers with command experience or a waiver of the same can be recommended for promotion). In short, notice of the waiver would have been superflous. Additionally, its absence did not prejudice the Plaintiff. The Instruction Book provided to the Board (Exhibit 10, Defendant's MSJ), informs the members that the command requirement may be waived.

See Instruction Book, Paragraph 4d. Plaintiff was not subjected to an arbitrary or capricious decision making process or to deprivation of property.

Perhaps the most fervent argument contained in the complaint claims the Defendants did not advise the Plaintiff of specific deficiencies which in the Board's opinion were responsible for his not being selected for promotion. Army Regulation 135-156 does not require a promotion board to give reasons, specific or otherwise, for not selecting particular officers. The Plaintiff correctly points out, however, that the Secretary's instructions to the Board did require findings of "the specific ... deficiencies which form the basis for the individual not being recommended for promotion." Pursuant to these instructions the Board "determined that ... [Plaintiff's] record did not reflect the professional qualifications and leadership required for promotion to general officer." *See* Exhibit 3 to Defendants' MSJ at 19. This determination by the Board was approved by the Secretary of the Army. *Id.* at 28. Since only the instructions of the Secretary required specific findings and the Secretary was satisfied with those findings, the Court cannot say that Plaintiff was deprived of any property to which he was entitled.

Again, Plaintiff has failed to allege or show in the voluminous material submitted in this case that he legitimately possessed an understanding that he would be supplied with specific findings of deficiencies. *See Board of Regents* v. *Roth, supra,* at 577. This omission derives not from oversight, but from the fact that no such understanding can be found in the rules or regulations of the Army. *Cf. Perry* v. *Sinderman,* 408 U.S. 593 (1972). Plaintiff can point only to confidential instructions which were given to persons other than himself at the demand

of the Secretary who has decided the findings are satisfactory for his purposes. Plaintiff cannot legitimately claim a property interest in this matter.

Plaintiff also failed to show that the Defendants' manner of complying with the Secretary's instructions was arbitrary or capricious since that compliance was entirely acceptable to the only individual requiring it. Plaintiff apparently finds the list of deficiencies to be non-specific. The Secretary did not. This Court cannot redefine the Secretary's own instructions.

In discussing the various elements of the complaint under the arbitrary and capricious standard the Court assumes that Plaintiff is not requesting substantive review of his qualifications vis a vis those of officers who were selected for promotion. To the extent the complaint can be so read, such relief is foreclosed. A claim " 'in which an officer is asking a court to interfere with the discretionary rating given the officer's performance' " is inappropriate for judicial review. *Woodward* v. *Marsh, supra* at 994.

Several arguable claims remain to be discussed. The Board which met on November 30, 1979, was without power to recommend retention of the Plaintiff in the Army Reserve after December 14, 1979. *See* 10 U.S.C. § 3851. Therefore, the alleged failure of the Board to recommend retention affirmatively or negatively was not the cause of any damage to Plaintiff. Finally, contrary to the claim described in Paragraph VII of the Original Complaint, the Defendants were not required to hear evidence concerning Plaintiff's non-selection for promotion if, in fact, he did not have a proper interest in promotion to the rank of brigadier general. *Board of Regents* v. *Roth, supra.* Because the Court earlier determined that he had no such

interest, that Paragraph adds nothing to the complaint and may be similarly dismissed.

The alleged deprivation of liberty without due process of law is the last claim which remains to be considered. This issue, however, appears to be foreclosed in this Circuit by the decisions in *Woodward* v. *Marsh, supra,* at 998, and *Sims* v. *Fox, supra. See* 5 U.S.C. §§ 552(b)(6), 552a(b). This conclusion is further supported by the Supreme Court's holding in *Bishop* v. *Wood,* 426 U.S. 341 (1976). There the Court held, despite the fact that the Chief of Police and the City Manager were aware of derogatory appraisals of the plaintiff's performance, that he had not suffered a cognizable injury to a liberty interest. Presumably, in that case just as is alleged in this case, the Plaintiff's reputation was diminished *within* the government agency which formerly employed him. Those facts, however, do not support a claim under the due process clause if the unfavorable information is not released to the public. *Id.* at 349. The Court is of the opinion that summary judgment should be granted. *See Houston North Hospital Properties* v. *Telco Leasing, Inc.,* 680 F.2d 19, 22 (5th Cir. 1982); *Woodward* v. *Marsh, supra.*

In reaching this conclusion the Court is not implicitly commenting favorably or unfavorably upon the appropriateness of the Army's decision in this matter. Rather it is simply recognizing that

> [t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or

> to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the ... [Fifth] Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

Bishop v. *Wood, supra,* at 349-50.

It is, therefore,

ORDERED that Defendants' motion for summary judgment is GRANTED; Plaintiff's motion for summary judgment is DENIED; and the complaint is DISMISSED on the merits.

DONE at Houston, Texas, this 8th day of February, 1983.

Ross N. Sterling
United States District Judge

S-12

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

SELDON B. GRAHAM, JR., *Plaintiff,* v. THREE OR MORE MEMBERS OF THE SIX MEMBER ARMY RESERVE GENERAL OFFICER SELECTION BOARD OF 30 NOVEMBER 1979, THE SECRETARY OF THE ARMY, AND THE UNITED STATES OF AMERICA REPRESENTED BY THE SECRETARY OF THE ARMY, *Defendants.*	CIVIL ACTION No. H-82-0063

FINAL JUDGMENT

This action came on for hearing before the Court, and the issues having been duly heard and a decision having been duly rendered,

It is ORDERED and ADJUDGED that the Plaintiff take nothing, that the action be dismissed on the merits, and that the Defendants recover of the Plaintiff Seldon B. Graham, Jr. their costs of action.

DONE at Houston, Texas, this 9th day of February, 1983.

ROSS N. STERLING
United States District Judge

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

SELDON B. GRAHAM, JR.,
Plaintiff,

v.

THREE OR MORE MEMBERS OF THE SIX MEMBER ARMY RESERVE GENERAL OFFICER SELECTION BOARD OF 30 NOVEMBER 1979, THE SECRETARY OF THE ARMY, AND THE UNITED STATES OF AMERICA REPRESENTED BY THE SECRETARY OF THE ARMY,
Defendants.

CIVIL ACTION
No. H-82-0063

ORDER

Pending before the Court is Plaintiff's motion to alter or amend judgment. The motion presents several arguments which will be addressed in turn to the extent considered appropriate.

Plaintiff first complains of Defendants' filing, in Civil Action No. H-80-1321, of a motion to stay operation of Rule 36, Fed.R.Civ.P. It is worthwhile to preface the discussion of these complaints with the observation "that the purpose of [motion] pleading is to facilitate a proper decision on the merits." *Conley* v. *Gibson*, 355 U.S. 41, 48 (1957). The subject requests for admissions are not deemed admitted.

Court records indicate Defendants' motion for stay of the time period applicable to Rule 36 was served on Plaintiff on November 24, 1980. He received and responded to that motion on or before November 26, 1980. Defendants' motion was accepted for filing on November 26, 1980,

because the requirements of local Rule 15A were clearly satisfied, *i.e.*, the motion states on its face that opposing counsel met in person and obviously they were "unable to reach an agreement" concerning whether continued discovery was appropriate during the pendency of the dispositive motions.

The local rule exists only to encourage settlement and to aid the Court in expeditious completion of its work. Plaintiff well knew he had not resolved the matter of the pending motion with Defendants. By November 26, 1980, Plaintiff had notice of Defendants' motion and by January 12, 1981, the date when the Court issued its Memorandum Opinion, there could have been no reasonable doubt that the Court had considered Defendants' motion to stay. Plaintiff does not claim, nor could he claim, that he was unaware of the contents of Defendants' motion — a motion for stay pending ruling on the dispositive motions. Plaintiff should have appealed at that point if he disagreed with the Court's disposition of the requests for admissions and the case as a whole. It was clear then that the Court had not deemed the requests admitted.

The Court concludes pursuant to Rule 36(a), Fed.R.Civ.P., that the requests for admissions were not deemed admitted and Defendants were permitted a "longer time as the court may allow" to respond to the requests. Alternatively, if the Rule did operate, the Court considers Defendants' motion for summary judgment (See memorandum in support thereof, at 43-45, filed September 9, 1982 (date stamped 1980 by error)), to effectively present a motion under Rule 36(b) to permit amendment of the deemed admissions. The Court finds it appropriate for the reasons stated here and in its Memorandum and Order of February 8, 1983, to grant relief from the operation of Rule 36. Such action does not prejudice Plaintiff. His subsequent use in this matter of

the requests for admissions is an attempt to determine this lawsuit on a technicality. Defendants simply cannot be fairly charged with admitting the requests which were apparently if not actually stayed in No. H-80-1321. Plaintiff has not relied on the subject admissions but rather has argued that the requests *should be* deemed admitted. If the requests were unrealistically deemed admitted, this entire suit would make very little sense because it would be premised on the incredible fact that every member of the Board voted for Plaintiff's promotion but inexplicably recommended the contrary.

OFFICER EFFICIENCY REPORT

Whether the Board members should have given more weight to Plaintiff's last efficiency report or rated Plaintiff's ability to perform as a general officer more highly because of the report is an issue that is inappropriate for this Court's review. *Woodard* v. *Marsh*, 658 F.2d 989, 994 (5th Cir. 1981), *cert. denied*, ... U.S. .... (1982). (The answers given there to the four relevant considerations are appropriate answers here also). It is evident from the records of this case that promotion boards review personnel records spanning the entire careers of recommended officers. Obviously, Board members must evaluate the importance of various assignments held by a given officer, rate his performance in each and attempt to predict prospective performance of work that the Army and the officer will be required to undertake in the future. This Court is without the necessary expertise to substitute its judgment for that of the two sets of Board members who have considered Plaintiff's case.

Plaintiff has not pointed to any "existing rules or understandings that stem from an independent source" to sup-

port his claim that a maximum score on one efficiency report entitles an officer to a reasonable expectation of promotion. *See Board of Regents* v. *Roth*, 408 U.S. 564 (1972).

RIGHT TO TRAVEL

The Court finds the right to travel argument unpersuasive. Plaintiff did not raise this issue originally in his complaint. Moreover, he has failed to show that he has standing to raise this claim, *i.e.*, he failed to show that he was unable at any time to hold a command position for one or two years as required by AR 135-156 ¶ 3-1c (1974), because of frequent personal travel. If the regulation under attack is constitutional as applied to Plaintiff and it has not unreasonably hindered *his* opportunity to travel, then he is without standing. *Young* v. *American Mini Theaters, Inc.*, 427 U.S. 50 (1976); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973). It is a plaintiff's burden to plead and substantiate the facts establishing standing to pursue a constitutional challenge. *See, e.g., Younger* v. *Harris*, 401 U.S. 37, 42 (1971).

Alternatively, there can be no question but that the Army has a compelling interest in insuring that most of its general officers possess significant command experience or, alternatively, "truly outstanding" records in other fields of endeavor. AR 135-156 ¶ 3-1c. It is important to note that a lack of appropriate command experience is not promotion disqualifying, but may be waived by the Army if the officer has not "had the opportunity to command" because of continual travel. *Id.* Additionally, there is no allegation that a commanding officer may not travel between the states during the course of his command tour. In fact, the regulation does not truly limit the right to travel. It requires only that sometime during a career of travel that an officer gain at least one year's experience commanding

troops. This experience can be obtained without stated limitation in any part of the nation. The subject regulation prescribes a reasonable method of protecting a compelling governmental interest as well as the constitutional interest at issue. It is not unconstitutional.

It is, therefore,

ORDERED that Plaintiff's motion to alter or amend judgment is DENIED, and this Order is adopted in *toto* as a supplement to the Memorandum and Order filed in this cause on February 8, 1983.

DONE at Houston, Texas, this 31 day of March, 1983.

Ross N. Sterling
United States District Judge

END OF DOCUMENT